IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 2574 OF 1993

Date of Decision : September 27, 2006.

For Approval and Signature :

The Honourable Mr. Justice S.K. Shah :

1. Whether Reporters of Local Papers may be allowed to see the Judgment?

2. To be referred to the Reporters or not?

3. Whether Their Lordships wish to see the fair copy of the Judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any Order made thereunder?

5. Whether it is to be circulated to the Civil Judges ?

6. Whether the case involves an important question of law and whether a copy of the Judgment should be sent to Nagpur, Goa and Aurangabad office?

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 2574 OF 1993

RAM SWARUP TAK ]
BUNGALOW NO. B1, ]
SHREE DATTAGURU SOCIETY]
DEONAR VILLAGE ROAD, ]
DEONAR, BOMBAY -88 ] ... PLAINTIFF.

VS.

MAHENDRA R. SINGH ]
ALIAS TAK, BUNGALFOW ]
NO.B-1, SHREE DATTA ]
GURU SOCIETY, DEONAR ]
VILLAGE ROAD, ]
DEONAR, BOMBAY - 88 ] ... DEFENDANT.

MR. R.S.TAK THE PLAINTIFF IN PERSON.
MR. JOSE GEORGE FOR THE DEFENDANT.

CORAM : S.K.SHAH, J.
DATE OF RESERVING THE JUDGMENT : 18/09/2006.
DATE OF PRONOUNCEMENT OF JUDGMENT : 27/09/2006.

- : JUDGMENT : -

1. The father has filed this Suit against the son for declaration that he is the absolute beneficial owner of the suit property and that the defendant has no beneficial right, title or interest of whatsoever nature in the suit property and for permanent injunction, restraining the defendant from dealing or disposing of

or alienating or creating third party rights in the suit property.

2. The suit property consist of Bungalow No. B-1 together with plot No. B-1, admeasuring 180 square metres, situated at Shri Dattaguru Society, Deonar village road, Deonar, Bombay - 88.

3. Earlier, the plaintiff and his two sons, defendant, who is the elder one and Narendra (since deceased) the younger one, were residing in flat No. 8 of Suprilina building at Chembur. In 1984, considering the growing need of the family and possibility of the two sons getting married, the plaintiff alleges, he planned for acquiring the additional premises elsewhere and as such, plaintiff caused the defendant to apply to CIDCO for allotment of ownership premises at Vashi. Accordingly, the defendant applied on 13th February, 1984, whereupon the CIDCO allotted to the defendant, an apartment of BS-4 (ii) type, then under construction, in Sector No. 9/10 at Vashi. The plaintiff alleges that alongwith the application form, it was necessary to pay Rs. 10,000/-. He, therefore, obtained the demand draft on 9.1.1984 for Rs. 10,000/- from his self acquired funds, drawn on Dena Bank, Vashi Branch and made the payment to CIDCO, against receipt. The remaining consideration of CIDCO flat was paid by him in the similar manner, by obtaining two demand drafts from his account, drawn on Dena Bank, vashi, one on 16.3.1984 and another on 26.4.1984, both for Rs. 63,000/- and paid the amount to CIDCO against the receipts. Thus, the plaintiff alleges that he acquired the CIDCO flat from his own funds but in the name of the defendant and that he himself paid the entire consideration of Rs. 1,36,000/-. All the three demand drafts were drawn on

his Dena Bank Account No. 5251. He, therefore, became absolute and exclusive beneficial owner of the said CIDCO flat.

4. He further alleges that since both of his sons, defendant and deceased Narendra had become of marriageable age,, he himself was desirous of shifting from Suprilina Flat. In the meantime, his second son Narendra died on 24.8.1986, in a car accident. Therefore also, it became impossible for him and his wife to continue to reside in Suprilina flat, after the death of younger son Narendra. He himself and his wife were totally dependent upon the defendant. It is under these circumstances, he decided to acquire the suit property, nominally in the name of the defendant. By agreement for sale, dated 17th September, 1986, made between Smt. Gulabdevi J. Sharma, the defendant agreed to purchase the suit property.

5. The plaintiff further alleges that the entire consideration of Rs. 6,50,000/- was paid by him. Rs. one thousand was paid in cash, as earnest money. For paying the stamp duty of Rs. 65,000/-, he had withdrawn from his own Saving Bank Account NO. 4573, maintained with Veerseva Urban Co-op. Bank Ltd., Chembur Branch (Rs. 14,000/- on 9.9.1986 and Rs. 50,000/- on 16.9.1986). As regards the balance consideration of Rs. 6,28,400/-, it was to be paid on 15th October,1986. For that purpose, on 2nd December, 1986, he paid to the defendant a sum of Rs. 3 lac, by cheque drawn on Canara Bank. On 4th February, 1987,he entered into an agreement for Sale executed between the defendant and one Mr. Merchand, sold CIDCO flat for a consideration of Rs. 1,50,000/-. On 4.2.1987 he paid the said amount to the defendant. He further alleges that he also paid

to the defendant Rs. 2 lac by cheque drawn on Canara Bank. Thus, he paid to the defendant totally Rs. 6,50,000/- from his own earnings and from his own bank account. Accordingly, the defendant paid to Mrs. Sharma, a sum of Rs. 6,28,400/-. He alleges that after the entire consideration was paid, he himself took vacant peaceful possession of the suit property. The balance sum of Rs. 20,600/- was utilised towards the payment to be made to the society, on behalf of Mrs. Sharma.

. He further alleges that on 3.9.1987 he paid to the defendant Rs. 45,000/- by cheque, drawn on North Kanara Bank GSB Ltd. and from that account, defendant paid to the Society, a sum of Rs. 20,000/- by way of transfer fee and Rs. 251/- as share capital and membership fee and Rs. 20,600/- on behalf of Mrs. Sharma as deposit in respect of re-grant lease of the land.

. He further alleges that for paying the price of the suit property, he had raised friendly loan from his friend and for the purpose of repayment thereof, he was constraint to sell the Suprilina flat on 23.10.1988 for the consideration of Rs. 3,75,000/-. He further alleges that he was working as a Chief Accountant and Financial Advisor of two reputed companies, in succession and was having extensive income of his own. He was also paying the maintenance charges to the society, electricity bills and all other charges in respect of the suit property. He further alleges that defendant fell in bad company and gradually it became clear that defendant would not mend his ways. In May, 1993, the defendant threatened the plaintiff with physical assault and claimed to be the absolute

exclusive beneficial owner and, therefore, he was forced to file this Suit for declaration and other reliefs.

6. The defendant resisted the suit by his written statement, dated 8th December, 2000. While denying all the allegations made in the plaint, he contends that the plaintiff himself admitted that the suit property has been purchased in the name of the defendant by registered agreement and the membership of the co-operative housing society also stand in his name, therefore, the plaintiff has no claim of whatsoever nature in respect of the suit property as beneficial owner. He contends that the plaintiff's claim in the suit is hit by the provisions of Benami Transactions (Prohibition of the Right to Recover Property) Act, 1988 and the suit is therefore liable to be dismissed with costs on that count alone.

. By specific pleadings, he contends that he alongwith his deceased brother Narendra were doing business of buying and selling electronic items, both Indian make and of imported brands, since 1981 and were earning handsome profits out of it. He contends that he himself and his brother were entrusting all their earnings with their parents, from time to time and the plaintiff was depositing the said money in his personal account and/or in his joint account with the mother. They never enquired with the plaintiff what he was doing with the said money. However, they were informed by their parents that the amounts were either deposited in the bank or were invested in shares and/or securities at the choice of the plaintiff. He further contends that he or his late brother never kept any account of the monies that were entrusted to the plaintiff and it was also the practice that as and when they required the

money, they were getting the same from their parents. He contends that CIDCO flat was purchased by plaintiff from the money so deposited by him and his brother in plaintiff's account, from time to time. He further contends that he himself and his deceased brother were also doing some business of marketing of household appliances and its spare parts, in partnership with one N.K.Pillai. He further contends that during his self employment, he came in contact with one J.P. Gandhi, through one of his chartered accountant friend and developed cordial relations with him. He was quite elder than him and had no children.

. He further contends that during 1984 to 1990, said J.P.Gandhi helped him and his late brother Narendra by advancing money, directly to them and/or on their behalf or their instructions to the third parties. In the year 1984-85, said J.P.Gandhi paid a sum of Rs. 1,00,000/- to the defendant, which was repaid by him to J.P.Gandhi. In 1985-86, he and his late brother had received Rs. 3,00,000/- as a loan from J.P.Gandhi for doing business and the same has been also lateron repaid. He contends that on 13th November, 1986, on his request J.P.Gandhi advanced Rs. 5,00,000/- as a loan to the defendant for acquiring accommodation and the said loan was advanced by pay order, issued in favour of the plaintiff, on his instructions, without any security or guarantee. Defendant further contends that the entire consideration of the suit property was paid by him directly from his account and that if at all it had been the intention of the plaintiff to purchase property, he could have purchased it in his own name and he could have purchased it either in the name of plaintiff himself or in the name of mother (wife of the plaintiff) or in their joint name. He further contends that the

plaintiff never had repaid any amount towards the said loan of Rs. 5,00,000/- taken by him from J.P.Gandhi. He , therefore, contends that the suit property was purchased by him in his own name by his own money and, therefore, the plaintiff purchasing the suit property in his name, did not arise at all. He further contends that the entire consideration of the suit property has been paid by him alone.

. He denies that the plaintiff was working as chief accountant and financial advisor of two reputed companies, in succession and had extensive income of his own. He further contends that he has been in continuous possession, use and occupation of the suit premises since he started residing there. With regard to the allegations of filing the complaint, he states that the said complaint was filed by the plaintiff with mala fide intention and ulterior motives. On these contentions, he claimed dismissal of the suit.

7. In view of the rival pleadings of the parties, the following issues are framed and I record my findings, against each of them, for the reasons given below :-

| ISSUES | FINDINGS |
|---|---|
| (1) Whether the Plaintiff ’s claim in Suit is barred by limitation? | (1) Yes. |
| (2) Whether the Plaintiff’s claim in Suit is barred by the provisions of the Benami Transactions ( Prohibition of the Right to Recover Property) Act, 1988 ? | (2) Yes. |
| (3) Does the Plaintiff prove that from his own separate f and self acquired funds, paid the entire purchase price of the CIDCO Apartment ? | (3) In the negative. |

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| (4) Does the Plaintiff prove that the Defendant contributed nothing towards the purchase price of the CIDCO Apartment? | (4) In the negative. |
| (5) Does Plaintiff prove that the Plaintiff was the absolute and exclusive beneficial owner of the CIDCO apartment? | (5) In the negative. |
| (6) Does the Plaintiff prove that the Defendant had no beneficial right, title, interest in the CIDCO Apartment? | (6) In the negative. |
| (7) Does the Plaintiff prove that he purchased the suit property nominally in the name of the defendant? | (7) In the negative. |
| (8) Does the Plaintiff prove that the entire price of the suit property was paid by the plaintiff out of his own self acquired funds, including by raising friendly loan? | (8) In the negative. |
| (9) Does the plaintiff prove that the defendant contributed nothing towards the purchase price of the suit property? | (9) In the negative. |
| (10) Does the Plaintiff prove that friendly loan of Rs. 5 lac advanced by Mr. J.P.Gandhi at his instance ad his own benefit only ? | (10) In the negative. |
| (11) Does the Plaintiff prove that the plaintiff is the real and beneficial owner of the suit property? | (11) In the negative. |
| (12) Does the Plaintiff prove that the Defendant has no beneficial right, title or interest in the suit property? | (12) In the negative. |
| (13) Does the Plaintiff prove that the plaintiff alone has been paying the monthly bills of the Society as also electricity bills in respect of the Suit property? | (13) In the affirmative. |
| (14) Whether the Plaintiff is entitled to a declaration | (14) In the negative. |

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| that the plaintiff is the sole absolute beneficial owner of the suit property and of the suit shares? | |
| (15) Whether the Plaintiff is entitled to a declaration that the defendant has no beneficial right, title, interest of whatsoever nature in the suit property? | (15) In the negative. |
| (16) What Order and decree? | (16) Suit is dismissed as per Final Order. |

**R E A S O N S**

**AS TO ISSUE NOS. 3 TO 6.:**

8. Before proceeding to consider these issues, it is necessary to take into consideration the background as to the earning capacity & the Plaintiff as also of the defendant.

. It is undisputed that Plaintiff was serving as a Chief Accountant with Morarjee Spinning and Weaving Mills. He retired from that Company in May, 1979, as a Chief Accountant. I August, 1979, he joined Airfreight Pvt. Ltd., as a Financial Advisor. He resigned that post with Airfreight in September, 1984. Thereafter he rejoined Airfreight Pvt. Ltd. in August, 1987., as a Financial Advisor, only on retainers basis and gave up that assignment i September, 1993.

9. So far Plaintiff denies the case of the defendant that he was doing business. According to the Plaintiff, the business was only of his younger son Narendra, who expired in a car accident on 24.8.1986. In this regard, however, the case of the defendant, as stated by him in his evidence, is that he completed his graduation in Science in 1979. Thereafter, he signed Articleship for the C.A. Course. He states that he passed Intermediate

C.A. Group II Examiation in November, 1980. In the last quarter of 1981, he almost stopped doing CA course. Somewhere in the year 1980, his younger brother Narendra completed his graduation and he started working with one Mr. Alok Kumar Tholiya, who was running a business in electric goods and general items. Narendra obtained certificate of registration under the Bombay Sales Tax Act in the name of M/s. Narendra Enterprises for doing business of resale of electrical goods, That certificate is produced at Exhibit 63. At the same time, Narendra also joined business with one Mr. Alok Kumar Tholiya and started Luxury Travels and Tours in the middle of 1981. Thereafter Narendra purchased Ambassador Car, bearing registration No. RSI 476 (later MGI 252) by taking loan of Rs. 50000/- from UCO Bank. However, that business of Luxury Travels and Tours was not successful and Narendra left that business. It is, thereafter, the defendant started his own business in the name of Grand Auto Services and Narendra started business in the name of M/s. Narendra Enterprises. In support of this , the defendant has produced at Exhibit D-20, the visiting card of M/s. Grand Auto Services. The defendant further states that by the end of the year 1981, he noticed that there was huge demand of electronic calculators and imported quartz wrist watches. Therefore, he started dealing in customs duty paid electronic goods, specially, calculators. As Narendra failed in his own business, he joined him in dealing with the customs duty paid imported electronic goods. During that period they established good contacts with number of customers. The defendant further states that in 1982, India hoisted Asian Games in New Delhi and as a result, the Government had liberalised the import of Colour TVs and Colour transmission was introduced in Bombay, in 1982.

Consequently, there was huge demand of Colour TVs and VCRs. Therefore, he himself and his brother Narendra extended their business in buying and selling the Colour TVs and VCRs and in that business, the defendant states, he also obtained license to use sharp double cassette recorder on 27th August, 1982, which is produced by him at Exhibit D-19. Thereafter, he obtained a telephone connection in his own name by making payment out of the income earned from his business. The telephone connection was installed in Suprilina Apartment. During this business of electronic items, he came in contact with J.P.Gandhi, who became very much fond of him (defendant) and became his regular customer. As his contacts with J.P.Gandhi improved, the latter assured to help the defendant in establishing and promoting his business. Likewise, by 1983, his business was established and he became self-sufficient. In the middle of 1983, he decided to establish another business of his own as J.P.Gandhi assured his moral and financial support. In the meantime, he learnt of manufacturing of Mould/ dies/ tools and came in contact with Mr. M.K.Pillai, who was the owner of Plastic Dies Company and was very reputed and established person in manufacturing business. There is no material cross-examination to this evidence of the defendant and, therefore, that evidence establishes that right from the year 1980, the defendant was doing different businesses, mainly of selling electric and electronic goods, calculators, imported quartz writ watches, Colour TVs ad VCRs etc. According to the Plaintiff the entire business was on cash basis and that he used to make purchases on cash basis and also sell the gods o cash basis.

10. As to the purchase of CIDCO flat, the Plaintiff’s

case is that it is he who made an application to CIDCO, on behalf of the defendant to get the flat. At his instance that the defendant made application to CIDCO for getting the flat. That application is produced at Exhibit P-2. It is dated 13th February, 1984. According to him, alongwith the application, he had paid the sum of Rs. 10000/- by way of demand draft, dated 9.1.1984, drawn in favour of the CIDCO and CIDCO issued the receipt, dated 10th January, 1984 and further according to him, he made the payment of Rs. 63,000/- on 16.3.1984 and another amount of Rs. 63,000/- on 24th May, 1984 by purchasing the demand draft from Dena Bank, in favour of CIDCO and likewise, he paid the total consideration of Rs. 1,36,000/- He states that these amounts were paid by him from his self acquired funds.

11. There is no dispute as to the fact that these three demand drafts were taken out from the Plaintiff's account with Dena Bank, drawn in favour of CIDCO. The question further is whether the funds lying with Dena Bank in account of the Plaintiff were his self acquired funds or they were of the defendant. In this connection, the case of the defendant is that these demand drafts were taken out from the money, deposited by him and his brother Narendra in the account of the plaintiff, from time to time, from the income of their business.

12. Under these circumstances, that the capacity of the Plaintiff to earn these amounts, will have to be looked into.

. In this connection, the plaintiff has admitted that during August, 1979 to September, 1984, the Plaintiff was employed with Airfreight Private Ltd. He

joined that company after he retired from the services of Morarjee Gokuldas Spinning and Weaving Mills, in May, 1979. Plaintiff admits that during the period from 1979 to 19084, his main income was from salary and he was receiving the salary by cheque from Airfreight Company, which was being deposited in Dena Bank Account No. 5251, the account from which the demand drafts were taken in favour of CIDCO, for making payment of the price of the CIDCO flat. The Plaintiff has produced the pass book of Dena Bank Account at Exhibit P-9. It is for the period from February, 1983 to March, 1985. The first payment of Rs. 1000/- was made on 9.1.1984 to CIDCO. By the end of December, 1983, the closing balance standing in this account of the Plaintiff was only Rs. 3221.50 Ps. Then on 9.1.1984, there is deposit of Rs. 5,000/- and there is again deposit of Rs. 20,000/-. The Plaintiff is unable to explain as to how these deposits, particularly of Rs. 25,000/- came to be made. It is admitted by the Plaintiff, that he retired from Airfreight - in September, 1984 and he was getting his salary by cheque. However he has not stated as to what was his monthly salary.

13. As against this, the defendant has stated that he himself and his brother Narendra used to make cash deposits in the account of the Plaintiff with Banks, from time to time. They were getting money from their parents i.e. the plaintiff and his wife, as and when they required. That was so because, at the relevant time, there was cordial relations between the plaintiff, defendant, Narendra and the plaintiff’s wife i.e. their mother. It is from these deposits, that the expenses used to be incurred. A perusal of the Dena Bank Passbook of the plaintiff, shows that there are deposits of large sums like 20,000/-, 16,000/-, 40,000/-,

50,000/-, 3000/-, 5000/-, 20,000/-, at different times to which there is no explanation from the Plaintiff. It, therefore, appears that the evidence of the defendant probable and most reliable when he states that he was depositing his income from business in the plaintiff's bank account.

14. As to the next two payments of Rs. 63,000/-, one on 16.3.1984 and another on 24.5.1984, the defence of the defendant is that, even these two amounts were also deposited by him in the account of the Plaintiff and that is fortified by the entries in the passbook. There is entry of deposit of Rs. 63,000/- on 8.3.1984 against which the demand draft of Rs. 63,000/- was taken out on 16.3.1984. Similarly, there is entry of Rs. 60,000/- on 22.5.1984 against which the demand draft of Rs. 63,000/- was taken out on 24.5.1984. The defendant has further stated that he himself and his brother Narendra had entrusted almost entire income generated from their business, with the Plaintiff and those amounts were deposited in plaintiff's account in banks and he was holding such huge amounts on their behalf. He further states that he himself and his brother were not in a position to make the payments to CIDCO from their account due to the nature of their business, which was exclusively on cash basis. The Plaintiff, at the instance of the defendant, agreed to obtain demand draft for an aggregate amount of Rs. 1,36,000/-, in favour of CIDCO on his (defendant's) behalf, from his bank account.

15. In this regard the explanation of the Plaintiff that he had taken loan from Airfreight Company for the purpose of making payment to the CIDCO. However, he has

not given any details thereof. The defendant has also stated that whatever loans the plaintiff had taken from Airfreight Company, the plaintiff had repaid that loan by utilising the cash deposits made by the defendant from his business income. Under the circumstance, it appears that although the demand drafts were taken or drawn from the Plaintiff's account, for making payment to CIDCO, totally for Rs 1,36,000/-, the amount utilised was from the cash deposits made by the defendant in plaintiff's account, from his business earnings.

16. The Plaintiff has admitted in cross-examination that between September, 1984 and August, 1987, he was unemployed. His source of income was interest on fixed deposits.- However, he has not give any details as to what was the amount of interest he was getting on fixed deposits. He also does not recollect as to what was the monthly expenses of the plaintiff during that period.

17. As to the plaintiff's income from salary, from Airfreight Ltd., between August, 1979 to October,1984, he states that it would be revealed from his income tax returns. He had filed the income tax returns, indicating that his net taxable income for the year 1979-80 was Rs. 34,330/-, for the year 1980-81, Rs. Rs. 79210/- , for the year 1982-83, Rs. 32,890/- and for the year 1984-85, Rs. 28940/-. From these figures, it is clear that excepting for the year 1980-81, the average monthly income of the Plaintiff from his salary was around Rs. 3,000/-, it was barely sufficient for incurring the monthly expenses of the family. It is, therefore, difficult to believe, when plaintiff states that he obtained demand drafts from his account with Dena Bank from his self acquired funds for purchasing the CIDCO flat. As against this, there is no dispute

that the defendant was doing business in electronic goods and other goods as stated above and had good income therefrom. Besides that he also purchased Fiat Car out of the income from his business. Under these circumstances, the issue Nos. 3,4,5,6 will have to be answered in the negative. At any rate, it is submitted on behalf of the Plaintiff that the plaintiff has not sought any declaration as to the right, title or interest in respect of the CIDCO flat. The Plaintiff had also not paid any capital gain tax after the said flat was sold for a consideration of Rs. 1,50,000/-, as I would be considering while discussing the other issues.

**AS TO ISSUE NOS. 7,8,9,10,11 AND 12.**

18. These are the main issues involved in this Suit. According to the Plaintiff his son Narendra expired in car accident on 24th August, 1986, as a result of which, it became impossible for him and his wife to continue and reside in their Suprilina flat. Therefore, he decided to purchase the suit property. He also states that as a result of death of their son Narendra, he himself and his wife lost all desires in life and became totally dependent physically and morally but not financially, upon the defendant, as he was the only surviving son. It was due to this reason, he desired to acquire the suit property, nominally in the name of the defendant, as such, by an agreement for sale, dated 17th September,1986, executed by the vendor Mrs. Sharma, in favour of the defendant, he agreed to purchase the suit flat. The total consideration for purchase was Rs. 6,50,000/-. On execution of the agreement on 17th September, 1986, the plaintiff states, he paid the sum

of Rs. 1000/- in cash by way of earnest money. He also paid stamp duty of Rs. 65 thousand, in cash by withdrawing the amount of Rs. 64,000/- from his saving bank account No. 4573 with Veerseva Urban Co-op. bank Ltd., being withdrawal of Rs. 14,000/- on 9th September, 1986 and Rs. 50,000/- on 10th September, 1986. He withdrew this amount in cash and paid the stamp duty. According to the plaintiff, with regard to balance of consideration of Rs. 6,28,400/-, it was to be paid on or before 15th October, 1986. The payment was delayed as it took longer time for him to arrange for the funds. He states that on or before 2nd December,1986, he paid to the defendant Rs. 3 lac by cheque, drawn on Canara Bank, Main Branch Mumbai and Rs. 2 lac, by cheque dated 5.3.1987, issued in favour of the defendant, drawn on Canara Bank. He further states that he started negotiations for sale of CIDCO flat and ultimately, sold it for a consideration of Rs. 1,50,000/-, which he paid to the defendant. Likewise, he states that he paid to the defendant totally Rs. 6,50,000/- in cash and it is therefrom that the amount of Rs. 6,50,000/- was paid by the defendant to the Vendor Mrs. Sharma. The amount paid to Mrs. Sharma was Rs. 6,28,400/-. The balance of Rs. 20,600/- was paid to the society on behalf of Mrs. Sharma, at the time of regrant of lease of the land by the society. He further states that on 3rd September, 1987, he paid to the defendant sum of Rs. 45,000/- by cheque drawn on Kanara Bank GSB Urban Co-op.Bank Ltd., Deonar Branch, Deonar, Mumbai. In support of this, the Plaintiff has produced the passbooks of Veerseva Urban Co-operative Bank Ltd., Canara Bank and Kanara Bank GSB Co-operative Bank Ltd., Deonar.

19. The Passbook of Veerseva Urban Co-op. Bank is produced at Exhibit P-10. There is certificate issued by the said bank, dated 12.5.1993, produced at Exhibit P-11, showing the payment of Rs. 15,000/- on 9.9.1986 and Rs. 25,000/-, on 16.9.1986. The Pass books of Canara Bank are at Exhibit 12-A and 12-B and the Certificate issued by the Canara Bank, dated 14.5.93 is at Exhibit P-13, in order to show payment of Rs. 3 lac and Rs. 2 lac, by cheque, dated 2.12.1986 and 5.3.1987. The Pass Book of North Kanara GSB Co-op..Bank Ltd., is produced at Exhibit P-44 and the Certificate issued by the Bank, dated 3rd June, 1993 is produced at Exhibit P-15.

20. It is undisputed that the purchase of the suit flat was made in the name of the defendant. From the aforesaid evidence it is further clear that what plaintiff had given to the defendant, was the money for the purpose of purchasing the flat. It is further undisputed that the payment had gone from the defendants account with the Bank, to the vendor Smt. Sharma.

21. The question would be whether these funds were the self acquired funds of the Plaintiff. As regards the amount of Rs. 150000/-, being the sale consideration of CIDCO Flat, there is evidence of defendant that it is he, who had sold the said CIDCO flat and received the consideration of sale and utilised it for the payment of consideration of the suit flat. There is, however, nothing on record to show that the Plaintiff had received this payment and made that payment to the defendant. The Plaintiff admitted in cross-examination that on sale of CIDCO flat, there was capital gain of Rs. 14000/- for which he did not pay any income-tax nor did he show that capital gain while

filing the income tax returns.

22. According to the Plaintiff, for raising the funds of Rs. 5 lac, which he paid to the defendant ( Rs. 3 lac and Rs. 2 lac), he had obtained the loan from Mr. J.P.Gandhi. As against this, however, there is evidence of the defendant to show that it is defendant, who had close contacts with J.P.Gandhi, it is the defendant, who had business venture of manufacturing plastic items with the moral and financial assistance of J.P.Gandhi. According to the defendant, it is at his instance that Mr. J.P.Gandhi issued the cheque of Rs. 5 lac, in favour of the Plaintiff and that amount was taken by him from J.P.Gandhi, as a loan and in future, he himself repaid that amount. In this connection, the defendant had also produced a Certificate of J.P.Gandhi, ( since deceased) which is produced at Exhibit 62, showing that J.P.Gandhi had given the loan of Rs. 5 lac to the defendant.

. With regard to cash payment of Rs.1000 /-, as earnest money and Rs. 65 thousands payment towards the stamp duty, the case of the defendant is that it is he who had given this amount to the plaintiff for being deposited in the account of the Plaintiff. A perusal of the concerned passbook, it would be seen that prior to withdrawal of Rs. 14,000/- on 9.9.86 by the Plaintiff, there are two deposits of Rs.30,000/- on 15.1.886 and on 7.8.86 Rs. 5,000/-. Further there are two deposits of Rs. 25,000/- on 16.9.86, on which date, there was withdrawal of Rs. 25,000/-, twice by cheques. There is, however, no explanation from the Plaintiff as to from where he got these amounts. In this regard, the evidence of the Plaintiff is only to the effect that he

had withdrew these amounts of Rs. 65,000/- on the respective dates. However, he had not stated that he had paid these amounts to the defendant or he paid the stamp duty in respect of the agreement, dated 17th September, 1986. On the contrary, at Exhibit 57, the defendant had produced the receipt, showing the payment of Rs. 65,000/- made by him.

. A perusal of Exhibit 57 (agreement, dated 17.9.1986) indicates that even Rs. 1000/- that was paid as earnest money, was paid by the defendant. It is also clear from the said agreement that the amount of Rs. 6,28,400/- , was paid by the defendant by three cheques, one being dated 6th March, 1987 for Rs. 1,05,000/- drawn on New Bank of India, Chembur Branch and the another cheque for Rs. 5,22,400/- , dated 6th March, 1987 drawn on the same New Bank of India, Chembur branch and the third cheque of Rs. 1000/-, dated 6th March, 1987, drawn on New Bank of India, Chembur Branch. It therefore clearly establishes the fact that it was the defendant, who had made payments of total amount of Rs. 6,28,400/- to the vendor Mrs. Sharma and also the cash payment of Rs. 1000/- as earnest money and Rs. 65,000/- as stamp duty.

23. It is a common ground that loan of Rs. 5 lac was taken from J.P.Gandhi. The dispute is as to whether the said loan was taken by the Plaintiff or by the defendant. In this regard, Plaintiff has clearly admitted in his evidence that he never visited J.P.Gandhi after the death of Narendra in car accident on 24.8.86 and that the defendant was the only person, visiting J.P.Gandhi. This makes it clear that the Plaintiff had no occasion to meet J.P.Gandhi, on or about the time when the payment of the consideration was

made as per the agreement, dated 17.9.1986. Moreover, the evidence of the defendant clearly shows that he had thick relations with J.P.Gandhi; that J.P.Gandhi had encouraged the defendant and Narendra, when he was alive, to enter into business venture; that J.P.Gandhi had encouraged the defendant to enter into the business of manufacturing plastic items , in partnership with N.K.Pillai. In this regard, the agreement entered into between the defendant and Narendra on one part and N.K.Pillai on the other. The said agreement is produced at Exhibit -32. This fact has also been admitted by the Plaintiff that there was such a partnership and an agreement was entered into in May, 1985. The defendant has also further stated that on previous occasions also he had taken loans from J.P.Gandhi for the purpose of his business. Under these circumstances, in all probabilities, it was the defendant, who had obtained the loan from J.P.Gandhi. The defendant has also stated that considering the nature of his business, he could not take loan in his own name and deposit in his own account and, therefore, he requested J.P.Gandhi, to give the loan in the name of the Plaintiff and, accordingly, the amount came to be deposited in the Plaintiff’s account but for the purpose of purchase of the suit property by the defendant. Therefore, the case of the Plaintiff that he had taken the loan for providing money to the defendant for the purpose of purchasing the suit property is baseless. The Plaintiff has also not challenged the evidence of the defendant in regard to having close relations with J.P.Gandhi in connection with his business. The Plaintiff has admitted that he was maintaining the two diaries, produced at Exhibit D-22 and D-23, in which details of the electronic goods are entered. This admission was substantiating the fact that the defendant was having business and business

earning as also that he had contacts with J.P.Gandhi. The defendant has also obtained the certificate from J.P.Gandhi, produced at Exhibit 62 to the effect that the loan of Rs. 5 lac was given by him to the defendant for the purpose of acquiring accommodation, namely, the suit property and the payment was made by pay order, issued in favour of the defendant's father, namely, R.S.Tak, the plaintiff herein. In view of all this evidence, it has to be held that the Plaintiff has failed to prove that he acquired the suit property, nominally in the name of the defendant. He also failed to prove that the entire suit property price was paid by him out of his own self acquired funds. He also failed to prove that the defendant has not contributed anything towards the purchase price of the suit property. He also failed to prove that the loan of Rs. 5 lac was taken by him from J.P.Gandhi, at his own instance for his own benefit. The Plaintiff has, consequently, failed to prove that he is the real and beneficial owner of the suit property and that the defendant has no beneficial right, title or interest in the suit property. Thus, all these issue Nos. 7 to 12 shall have to answered in the negative.

**AS TO ISSUE NO. 13.**

24. In this regard, the Plaintiff has stated that he has been paying the monthly bills of the society as also the electricity bill. However, this is of little consequence, as it will have no bearing on the acquisition of the proprietary right in the suit property. It is a fact that the Plaintiff has been residing in the suit property and using the same for the occupation for himself and his wife. The defendant is also living in the same house property. As such the

payment of monthly bills of the society and electricity bills will be of no consequence. There is, however, evidence in favour of the Plaintiff in this regard and, therefore, this issue has to be answered in the affirmative.

**AS TO ISSUE NO. 14 & 15.**

25. In view of the negative answers against issue Nos. 7 to 12, these issues have to be answered in the negative. The Plaintiff failed to prove that he has acquired the suit property from his own earnings, he is not entitled to declaration that he is the absolute beneficial owner of the suit property. Consequently, the Plaintiff is also not entitled to a declaration that the defendant has no beneficial right, title and interest in the suit property. These issues therefore answered accordingly.

**AS TO ISSUE NO. 1**:

26. The Suit is filed for declaration of the ownership of the suit property. The limitation is of three years, when the right to sue first accrues, as per Article 58 of the Limitation Act. The Plaintiff has stated that the cause of action to file this suit arose on 19th May, 1993 when the defendant threatened the Plaintiff with physical assault to evict from the suit property. The suit having been filed on 14.7.1993 is, therefore, within limitation. The Issue No.1, therefore, shall have to be answered in the affirmative.

**AS TO ISSUE NO. 2:**

27. It is the contention of the defendant that the

Suit is barred by the provisions of Benami Transactions ( Prohibition of the Right to Recover the Property) Act, 1988. The relevant provisions are contained in Section 4(1) and (3) of the said Act. They are as under :-

> "4. Prohibition of the right to recover property held benami - (1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other parson shall lie by or on behalf of a person claiming to be the real owner of such property.
>
> (2) ...
>
> (3) Nothing in this Section shall apply.-
>
> (a) where the person in whose name the property is held is a co-parcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or
>
> (b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity "

. The case of the plaintiff is hat he has purchased the suit property in the name of the defendant and is seeking the declaration to that effect and also the declaration that the defendant has no beneficial right, title or interest in the suit property and also claiming the injunction against the defendant.

. Such a suit is, therefore, barred by the provisions of Section 4(1) of the said Act. It is also not a case, which would fall under the provisions of Section 3(a) or (b) as that is not the case of the Plaintiff. The Plaintiff has not based the case on the averments that the acquisition of the suit property is by joint Hindu family of himself and the defendant. The defendant cannot be said to be a trustee or having any fiduciary relations with the plaintiff as such.

28. The learned Counsel for the defendant further submits that the present case is not a benami transaction. He states that the benami transaction is the transaction in which the property is transferred to one person for a consideration paid or provided by another person. He submits that in the present case, the allegation of the plaintiff is that he had provided money to the defendant for purchasing the suit property. He submits that this aspect would not fall under the definition of "benami transactions" under Section 2(a) of the Act. The allegation of the plaintiff having provided money to the defendant for purchasing the suit property will not fall under this definition. For this purpose, he relied on a decision of the Apex Court in case of PAWANKUMAR GUPTA VS. ROCHIRAM NAGDEO reported in (1999) 4 SCC 243. The relevant observations of the Apex Court are as under :-

> 29. Section 2(a) of the Benami Act defines benami transaction as " any transaction in which property is transferred to one person for a consideration paid or provided by another person"
>
> . The word "provided" in the said clause cannot be construed in relation to the source or sources from which the real transferor made up the funds for buying the sale consideration. The words "paid or provided" are disjunctively employed in the clause and each has to be tagged with the word "consideration". The correct interpretation would be to read it as "consideration paid or consideration provided". If consideration was paid to the transferor then the word provided has no application as for the said sale. Only if the consideration was not paid in regard to a sale transaction the question of providing the consideration would arise. In some cases of sale transaction ready payment of consideration might not have been effected and then the provision would would be made for such consideration. The word "provided" in Section 2(a) of the Benami Act cannot be understood in a different sense. Any other interpretation is likely to harm the interest of persons involved in genuine transactions, e.g., a purchaser

> of land might have availed himself of loan facilities from banks to make up purchase money. Could it be said that since the money was provided by the bank, it was a benami transaction"

. In the present case, according to the allegations of the plaintiff, he had provided money to the defendant for the purpose of purchasing the suit property. It is an admitted position that the defendant had paid the entire consideration to the vendor and, therefore, that would not be the case falling under the definition of "benami transaction". The nature of the transaction would have been benami transaction only if the consideration was directly paid by the plaintiff to the vendor, showing the defendant’s name as purchaser, however, that is not the case here. The suit of the plaintiff therefore would be barred by the provisions of Section 4 of the said Act.

. At any rate, as discussed above, the plaintiff has failed to prove that he had provided money to the defendant for purchasing the suit property.

29. Another aspect of the matter is, whether the provisions of the said Act would be applicable to the present case as the date of purchase of the property was 17.9.1986 and the Act has come into force on 5th September, 1988. In this regard, although the transaction of purchase was earlier to the coming into force of the said Act, the Act would be applicable as the Suit was filed subsequent to coming into force of this Act.

. Section 4 prohibits the right to recover the property held benami. This provision, therefore, applies when the suit is filed for enforcing right in respect of any property, held benami, against the person

in whose name the property is held. Here the defendant has held the property, as alleged by the plaintiff, as benamidar. Such a suit would be barred although the Act has come into force after the transaction. In this regard the learned Counsel for the Defendant has placed reliance on the decision of the Apex Court in case of R. RAJGOPAL REDDY (DEAD) BY LRS AND ORS. VS. PADMINI CHANDRASEKHARAN (DEAD) BY LRS., reported in (1995) 2 SCC 630. The relevant observations of the Apex Court are as under :-

> "11. ..... It is, however, true as held by the Division Bench that on the express language of Section 4(1) any right inhering in the real owner in respect of any property held benami would get effaced once Section 4(1) operated, even if such transaction had been entered into prior to the coming into operation of Section 4(1), and henceafter Section 4(1) applied no suit can lie in respect to such a past benami transaction. To that extent the section may be retroactive. To highlight this aspect we may take an illustration. If a benami transaction has taken place in 1988 and a suit is filed in June, 1988, by the Plaintiff claiming that he is the real owner of the property and defendant is merely a benamidar and the consideration has flown from him, then such a suit would not lie on account of the provisions of Section 4(1)...."

30. At any rate, in the present case the plaintiff has failed to prove that the consideration for the purchase of the suit property was paid by him. Therefore, even otherwise, he cannot succeed in the present Suit.

31. In this view of the matter, the Suit of the Plaintiff fails.

. Therefore, the Suit is dismissed. However, there will be no order with regard to costs considering the relations of the parties.

.....

[S.K.SHAH,J.]

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
SUIT NO. 2574 OF 1993

RAM SWARUP TAK ]
BUNGALOW NO. B1, ]
SHREE DATTAGURU SOCIETY]
DEONAR VILLAGE ROAD, ]
DEONAR, BOMBAY -88 ] ... PLAINTIFF.

VS.

MAHENDRA R. SINGH ]
ALIAS TAK, BUNGALFOW ]
NO.B-1, SHREE DATTA ]
GURU SOCIETY, DEONAR ]
VILLAGE ROAD, ]
DEONAR, BOMBAY - 88 ] ... DEFENDANT.

MR. R.S.TAK THE PLAINTIFF IN PERSON.
MR. JOSE GEORGE FOR THE DEFENDANT.

CORAM : S.K.SHAH, J.
DATE : 27/9/2006.

P.C.

. For the reasons separately recorded in the Judgment, the following Order is passed :-

ORDER

(1) The Suit is dismissed. However, there will no Order with regard to the costs considering the relations of the parties.

.....

[S.K.SHAH, J.]

Bombay,
September 30, 2006.

To,

The Incharge,
NIC Centre,
High Court, Bombay.

Sir,

I have to state that despite changing the cartridge (Ribbon) of the Printer provided to me, its printing is very light and illegible. It may be that the HEAD must have some problem. So by deputing some of your engineers please confirm the same and, if necessary, please replace the HEAD or do the needful if any other repairing is required to be done.

Yours faithfully,

[D. V. Godbole.]
P.A. to S.K.Shah, J.